U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 20 April 2005

BALCA Case No.: 2004-INA-27
ETA Case No.: P2003-NY-02490298

In the Matter of:

MEHRAN ETESSAMI,
Employer,

on behalf of

DINA HAKIMIAN,
Alien.

Appearance: S. Bernard Schwarz, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer of an application for alien employment certification. Permanent alien employment certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and Title 20, Part 656 of the Code of Federal Regulations. We base our decision on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 30, 2001, Mehran Etessami ("the Employer") filed an application for labor certification to enable Dina Hakimian ("the Alien") to fill the position of Cook/Household, live-in. (AF 8). Two years of experience in the job offered or in the related occupation of restaurant cooking were required. The hours of employment were from 5:30 a.m. to 8:30 a.m. and 4:30 p.m. to 9:30 p.m., Monday through Thursday -- from 5:30 a.m. to 8:30 a.m. and 2:30 p.m. to 7:30 p.m. on Fridays -- and from 8:00 a.m. to 12:00 noon on Sundays. The Employer made a request for a reduction in recruitment ("RIR") by letter dated April 27, 2001. (AF 11).

The CO issued a Notice of Findings ("NOF") on February 18, 2003, proposing to deny certification. (AF 28). The CO noted that the Employer's request for an RIR had been reviewed; however, the deficiencies noted in the NOF had to be addressed. One of those issues was whether the position of domestic cook actually existed in the household or had been created solely for the purpose of qualifying the Alien as a skilled worker. The Employer was directed to explain why the position of domestic cook should be considered a *bona fide* job opportunity and to include in rebuttal responses to eight questions as well as production of certain documentation. The Employer was directed to produce signed copies of Federal Income Tax returns for the immediately preceding calendar year from the date of the application through the current year.

Counsel for the Employer submitted rebuttal by letter dated March 21, 2003. (AF 44). Included were a Financial Statement, tax returns for 2000 and 2001 and a previously provided statement from the Employer regarding the need for a live-in household cook. The Employer stated that the cook's day would begin at 5:30 a.m. when she was expected to prepare a breakfast for the household and/or visitors. The adult working members of the household depart between 7:00 a.m. and 8:30 a.m. After breakfast, the cook would be expected to have a packed lunch ready for the Employer's wife and for him, depending on the day of week, work schedule and eating plans of the household. The cook would be

expected to do grocery shopping during the week. The Employer stated that his wife works out of the house two days a week and part-time in the house on other days. She, the Employer's mother, and his mother-in-law share in taking care of the household's two children, who were at the time of the statement two years old and five months old respectively. The Employer asserted that as a result, the household does not need a nanny. The Employer also asserted that the household employs a cleaning service once or twice a week, so the cook's only cleaning duties relate to the kitchen area. As a result, the cook's morning duties are generally over by 8:30 a.m. to 9:30 a.m. (AF 32).

The Employer's rebuttal stated that the cook's dinner preparations would begin around 4:40 p.m., or sooner on special occasions, and be generally completed by about 9:30 in evening, and sooner on Fridays. The Employer asserted that having a cook will enable him and his wife to work longer hours, thereby justifying the cost. He stated that their combined household earnings are in excess of $90,000, that his father contributes to the expenses of the cook, and that the cook's salary would represent about 15% of the household's gross income. (AF 32).

In the attorney's cover letter to the rebuttal, he conceded that neither entertainment nor a specialized diet are factors in the household's decision to hire a cook. (AF 42-43). The attorney indicated that the Employer would provide no response to the business necessity of the live-in requirement citation in the NOF because the CO had not asked any specific questions about that issue.

The CO issued a Final Determination ("FD") on June 10, 2003, denying certification. (AF 47). The CO determined that the Employer failed to establish that the job opportunity was *bona fide* in violation of 20 C.F.R. § 656.20(c)(8), or that the Employer had enough funds available to pay the wage offered, in violation of 20 C.F.R. §656.20(c)(1).[1] In the Final Determination, the CO wrote:

[1] The CO also found in the Final Determination that the Employer had failed to provide documentation of the Alien's past paid experience, in violation of 20 C.F.R. § 656.21(a)(3)(iii). The Employer argues that such experience is only required for Schedule B occupations. In view of our disposition below, we do not reach this issue.

> In our Notice of Findings on pages 2 and 3, we asked a series of eight questions concerning the bona fide nature of the job opportunity within the employer's household as a permanent full-time Household Cook. Employer's rebuttal does not successfully address those questions.
>
> According to employer's rebuttal, the household consists of the employer, his wife and two small children (aged 4 and 2 1/2 years). The employer works five days per week and his wife works two days per week; they each leave the house between 7:30 and 8am on days when they work. Either the employer's mother or mother-in-law takes care of the children and the Domestic Cook prepares breakfast and dinner for the employer, his wife, their children, and grandmother(s); and lunch for the same group, although it is packed for the employer and his wife on days when they work. There is no substantial entertaining and there was no entertainment schedule submitted. No medical condition requires a special diet. The rebuttal does not indicate that a Domestic Cook has been employed in employer's home prior to the hiring of the alien and it does not indicate what change in employer's household has necessitated her hiring.
>
> We hold that the evidence on file is insufficient to substantiate a bona fide full-time job opening for a domestic cook exists within the employer's household.

(AF 46).

The Employer filed a Motion to Reopen and Reconsider Decision on July 8, 2003. (AF 77). The Employer argued that the finding on sufficiency of funds was in error because the Employer's tax return showed taxable interest income of $19,812 and the rebuttal had included a Financial Statement prepared by a CPA showing substantial cash reserves as of April 25, 2001. The Employer's motion attached bank statements to document those cash reserves. The Employer, therefore argued that the CO had erroneously only considered the Employer's taxable income as shown on the tax return. The Employer also argued that the absence of a household cook prior to the hiring of the Alien was not sufficient grounds in itself to find that the job was not *bona fide*. The motion attached affidavits attesting that the Employer's mother and mother-in-law cared

for the children. The Employer argued, through his attorney's statement, that he also engages a cleaning person once or twice a week to do the cleaning and laundry. The attorney argued that the Employer's wife had determined that a cook was needed after the birth of their second child because she found it dangerous and burdensome to cook with a small child in the kitchen, and because she was too tired at the end of a day to deal with culinary needs.

The CO denied the Request for Reconsideration on July 22, 2003. (AF 79). The Employer requested review and on December 29, 2003, the case was docketed by the Board.[2] (AF 86, 94).

In his brief on appeal, the Employer argued that the CO ignored the Employer's justification for a household cook, that being the birth of a child. The Employer also argued that he had documented a sufficiency of funds to pay the Alien's salary.

DISCUSSION

In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), a case involving an application for a domestic cook, the Board held that a CO may properly invoke the *bona fide* job opportunity analysis authorized by 20 C.F.R. § 656.20(c)(8) if the CO suspects that the application misrepresents the position offered as skilled rather than unskilled labor in order to avoid the numerical limitation on visas for unskilled labor. A totality of the circumstances analysis is applied. Factors such as the inherent implausibility of a household using a significant percentage of its disposable income to hire a cook may be considered. A separate, albeit somewhat related, requirement of the regulations is that

[2] In the denial of the motion for reconsideration, the CO erroneously indicated that the matter would be forwarded to BALCA for review. (AF 79). The CO did not immediately forward the matter to BALCA, apparently because the Employer had not requested such review in the motion for reconsideration. Later, the CO confessed error on this point and in a telephone communication with the Employer's attorney's office stated that a request for BALCA review could be filed and that the CO would not contest the timeliness of such a request. (*see* AF 80-95). The Employer filed the request for review the same day as the telephone conversation with the CO's office. In view of these circumstances, we accept the appeal as timely.

the employer "has enough funds available to pay the wage or salary offered the alien." 20 C.F.R. § 656.20(c)(1).

At the time of rebuttal in the instant case, the evidence regarding the Employer's ability to pay the Alien's wages was limited to 2000 and 2001 tax returns, and a Financial Statement prepared by the Employer's CPA. Since the bank statements submitted in the motion to reconsider were not considered by the CO, neither can they be considered by the Board on review. *Construction and Investment Corp., dba Efficient Air*, 1988-INA-55 (Apr. 24, 1989) (*en banc*).

The tax returns show total income near $100,000 in 2000 and well over that amount in 2001. Much of the income was based on taxable interest income or capital gains. The Financial Statement shows a very substantial net worth for the household, including a large cash reserve, value of the home, and investments, with the only liability being a mortgage on the home. These factors tend to support a finding that the Employer has enough funds available to pay the Alien's salary.

On the other hand, the tax returns also show substantial itemized deductions and hefty tax bills, suggesting that much of the Employer's total income is devoted to expenses incurred by the household prior to consideration of paying a worker to cook in the home. The CPA's Financial Statement is accompanied by a letter stating that the information contained in the report is based on the Employer's own statements, and not based on an independent audit or review. Accordingly, the fact that a CPA signed the statement gives it no more credibility than if the Employer had made the representation himself without supporting documentation. We note that bank statements provided in the motion for reconsideration lend credence to the CPA's analysis - but they were not in the record at the time of the Final Determination, and were not considered by the CO prior to rejecting the motion for reconsideration. The rebuttal makes a passing reference to financial assistance for the cook's salary from the Employer's father, but this assistance was not documented and is not among the contentions in the appellate argument.

The question of sufficiency of funds, within the context of the *bona fide* job opportunity issue, is not so neat as the simple question of whether the employer has enough total dollars to pay the Alien Rather, the relevant question is whether the employer has shown that he has enough financial resources to credibly support a finding that the job offer is *bona fide.* Here, we do not believe that the Employer's yearly income is sufficient to credibly support the belief that he would devote a quite substantial portion of that income to pay the Alien wages to do nothing but cook for the family. Assuming that the information about the Employer's cash reserves is accurate (and we again note that in the rebuttal itself, this assertion is essentially based solely on the Employer's undocumented assertions, even though he got his CPA to sign the letter), the question is whether a family would be willing to chip away at its financial reserves to pay for the Alien's services as a cook In some special cases, it may; but in the instant case, although the Employer's financial circumstances are apparently quite good, they are not so substantial that paying a household cook's salary would not be noticed. Although the Employer has proffered that the need for the cook arose after the birth of a child, it is much more plausible that the introduction of an additional child into the household would lead a parent to conclude that they needed a nanny or general housekeeper -- not someone whose only duties are cooking related.

Thus, in the instant case, it appears likely that the Employer would not be forced to default on paying the Alien's wages, and therefore the application passes muster under section 656.20(c)(1), the sufficiency of funds requirement. Nonetheless, the household's financial circumstances are not so clearly secure that its case for the *bona fides* of the cook position is made significantly more credible by its financial condition. In this case, the Employer's financial condition is essentially a neutral factor.

Looking to the other circumstances of the household, we note that the CO merely summarized the Employer's rebuttal contentions and simply stated that the contentions were not sufficient.

Nonetheless, we conclude after a review of the totality of the circumstances that the Employer has failed to establish that it is offering a bona fide position for a domestic cook as opposed to a nanny or a general housekeeper.

First, we note that the idea of hiring a domestic cook allegedly arose shortly after the birth of a second child. As noted above, a more plausible reaction to the birth of a child would be to seek a nanny or general housekeeper rather than to pay for a professional cook. The fact that the position is live-in further suggests that the household's interest is in having someone available for the overall care of children and the house rather than for a professional cook. Typically, a domestic cook position would not require that the cook live on the premises. The Employer's statement that it would not provide rebuttal on this issue because the CO had not asked any specific questions about this job requirement strongly suggests that the true reason for not addressing this issue is that the Employer cannot provide a plausible explanation for need to have a cook live on the premises if, in fact, that employee's only responsibilities are cooking related.

We also note that the Employer's rebuttal, except for the tax returns, is based essentially on self-serving statements, unsupported by any underlying documentation. The Employer's rebuttal contains no documentation of a contract with, or invoices concerning, the use of a cleaning service. As the Employer's attorney conceded, the household does not do any extensive entertaining or have any special dietary requirements that might establish the credibility of the household cook position.

As the full Board stated in *Carlos Uy, supra*: "When an employer presents a labor certification application for a "Domestic Cook," attention immediately focuses on whether the application presents a *bona fide* job opportunity because common experience suggests that few households retain an employee whose only duties are to cook, or could even afford the luxury of retaining such an employee. The DOT contemplates that a domestic cook is a skilled, professional cook, and would be able to cook sophisticated meals, as illustrated by the much higher experience requirement. Thus, such an application raises the question of whether the employer is really seeking a housekeeper,

nanny, companion or other general household worker, or is attempting to create a job for the purpose of assisting the alien in immigrating to the United States. One motive for categorizing a job as a domestic cook rather than as another type of domestic worker is to avoid the long wait for a visa for an unskilled laborer ..." USDOL/OALJ Reporter at 5-6 (footnotes omitted).

In *Carlos Uy*, the Board also stated that "[t]he heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position." In the instant case, the Employer presents a household with two very young children filing an application for a cook motivated by the birth of the second child and a stated desire for a worker to live on the premises. Such circumstances strongly suggest a need for the type of unskilled domestic service worker noted in *Uy* rather than a skilled, professional home cook whose only duties are cooking related. Although the family apparently has sufficient funds to pay the Alien's salary, it would probably have to tap into its investments to do so. The Employer's rebuttal in support of a *bona fid*e job opportunity for a skilled cook in its home is essentially grounded in undocumented assertions. Based on these circumstances we find that the Employer failed to rebut the CO's citation of lack of a *bona fide* job opportunity under section 656.20(c)(8).

This application was before the CO in the posture of a request for reduction in recruitment. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Subsequent to *Compaq Computer, Corp.,* however, this panel recognized that a remand is not required where the application is so fundamentally flawed that a remand would be pointless, such as finding of a lack of a *bona fide* job opportunity. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004). That is the circumstance in this case. Accordingly, the CO's denial of labor certification will be affirmed.

ORDER

The Certifying Officer's Final Determination denying labor certification is **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, D.C. 20001-8002

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typed pages. Upon the granting of a petition the Board may order briefs.